No. 91-542

IN THE

Supreme Court of the United States

OCTOBER TERM 1991

ELLIS B. WRIGHT, JR., *et al.*,
Petitioners,
v.
FRANK ROBERT WEST, JR.,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICI CURIAE* OF BENJAMIN R. CIVILETTI, NICHOLAS deB. KATZENBACH, EDWARD H. LEVI, ELLIOT L. RICHARDSON, *et al.* IN SUPPORT OF THE RESPONDENT

James S. Liebman
Columbia University
School of Law
435 West 116th St.
Box B-16
New York, N.Y. 10027

Douglas G. Robinson*
Julia E. Sullivan
1440 New York Ave., N.W.
Washington, D.C. 20005
(202) 371-7000

Counsel for Amici Curiae

*Counsel of Record

AMICI CURIAE

Floyd Abrams, Attorney

Philip S. Anderson, Attorney

Birch Bayh, Former United States Senator, Indiana

Hyman Bookbinder, Washington Representative Emeritus, American Jewish Committee

Albert P. Brewer, Former Governor of Alabama

John H. Buchanan, Former Member of Congress, Alabama

Haywood Burns, Dean, City University of New York School of Law at Queens College

Guido Calabresi, Dean, Yale Law School

Julius L. Chambers, Director-Counsel, NAACP Legal Defense and Educational Fund

L. Stanley Chauvin, Jr., Former President, American Bar Association

Benjamin R. Civiletti, Former Attorney General of the United States

Dick Clark, Former United States Senator, Iowa

W. J. Michael Cody, Former Attorney General, Tennessee

John J. Curtin, Jr., Former President, American Bar Association

Lloyd N. Cutler, Former Counsel to the President

Drew S. Days, III, Former Assistant Attorney General of the United States

John A. Dixon, Jr., Former Chief Justice, Louisiana Supreme Court

John W. Douglas, Former Assistant Attorney General of the United States

Robert F. Drinan, S.J., Former Member of Congress, Massachusetts

Thomas F. Eagleton, Former United States Senator, Missouri

Raymond Ehrlich, Former Chief Justice, Florida Supreme Court

Arthur J. England, Jr., Former Chief Justice, Florida Supreme Court

Marvin E. Frankel, Former Judge, United States District Court, Southern District of New York

John Hope Franklin, James B. Duke Professor of History Emeritus, Duke University

Don Fraser, Mayor, Minneapolis, Minnesota

Stanley H. Fuld, Former Chief Judge of the New York Court of Appeals and of the State of New York

John J. Gibbons, Former Chief Judge, United States Court of Appeals for the Third Circuit

William A. Grimes, Former Chief Justice, New Hampshire Supreme Court

Joseph R. Grodin, Former Associate Justice, California Supreme Court

William J. Guste, Jr., Former Attorney General, Louisiana

Reverend Theodore M. Hesburgh, C.S.C., President Emeritus, University of Notre Dame

L. Eads Hogue, Former Prosecutor, United States Department of Justice

Shirley M. Hufstedler, Former Judge, United States Court of Appeals for the Ninth Circuit

Richard J. Hughes, Former Governor of New Jersey, Former Chief Justice, New Jersey Supreme Court

Thomas L. Johnson, Former County Attorney, Hennepin County, Minnesota

Robert W. Kastenmeier, Former Member of Congress, Wisconsin

Barbara Jordan, Former Member of Congress, Texas

Nicholas DeB. Katzenbach, Former Attorney General of the United States

Richard H. Kuh, Former District Attorney, New York County

Philip A. Lacovara, Former Deputy Solicitor General of the United States

William M. Leech, Jr., Former Attorney General, Tennessee

George N. Leighton, Former Judge, United States District Court, Northern District of Illinois

Edward H. Levi, Former Attorney General of the United States

Arthur L. Liman, Former Chief Counsel, Senate Select Committee on Investigation of Military Sales to Iran/Contra

Hans A. Linde, Senior Judge, Oregon Supreme Court

Robert MacCrate, Former President, American Bar Association

Charles McC. Mathias, Former United States Senator, Maryland

Jim Mattox, Former Member of Congress, Former Attorney General, Texas

James F. Neal, Former United States Attorney, Tennessee

John H. Pickering, Attorney

Jack Pope, Former Chief Justice, Texas Supreme Court

Joseph L. Rauh, Jr., General Counsel, Leadership Conference on Civil Rights

Robert D. Raven, Former President, American Bar Association

Elliot L. Richardson, Former Attorney General of the United States

Peter W. Rodino, Jr., Former Chairman, Committee on the Judiciary, United States House of Representatives

Charles F. C. Ruff, Former United States Attorney, District of Columbia

Whitney North Seymour, Jr., Former United States Attorney, Southern District of New York

James M. Shannon, Former Attorney General, Massachusetts

Chesterfield Smith, Former President, American Bar Association

Robert M. Spire, Former Attorney General, Nebraska

Geoffrey R. Stone, Dean, University of Chicago Law School

Alan C. Sundberg, Former Chief Justice, Florida Supreme Court

Leonard v.B. Sutton, Former Chief Justice, Colorado Supreme Court

Telford Taylor, Nash Professor of Law, Emeritus, Columbia Law School

Harold R. Tyler, Jr., Former Deputy Attorney General of the United States, Former Judge, United States District Court, Southern District of New York

Cyrus R. Vance, Former Secretary of State

QUESTION PRESENTED

This brief will address the following question:

In determining whether to grant a petition for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court, should a federal court give deference to the state court's application of law to the specific facts of the petitioner's case or should it review the state court's determination de novo?

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MOTION OF BENJAMIN R. CIVILETTI, NICHOLAS deB. KATZENBACH, EDWARD H. LEVI, ELLIOT L. RICHARDSON, et al. FOR LEAVE TO FILE BRIEF

The 66 individuals listed on the inside front page hereby move, pursuant to Rule 37.4, for leave to file the attached brief amici curiae in support of the Respondent. The Respondent has consented to the filing of this brief and has filed a letter to that effect with the Clerk of

the Court. The Petitioners have declined consent and have so notified the Clerk. The Respondent did not decline consent for any of the amici briefs filed in support of the Petitioner.

Amici are distinguished citizens who collectively have an extraordinary wealth of knowledge, experience and insight regarding the principal issue in this case. They include four former Attorneys General of the United States, eleven former members of Congress, two former governors, six former state attorneys general, eleven former state appellate court judges, five former federal judges, three former United States Attorneys, and four former presidents of the American Bar Association. They also include legal scholars, practicing lawyers and leaders in other professions. Their common interest and concern is that federal habeas review continue to

be available to state prisoners who have been unconstitutionally convicted and sentenced.

The brief of these amici addresses at least two issues that they believe are not being addressed to the same extent by the parties or the other amici. The attached brief discusses in some detail the language and legislative history of the 1966 amendments to the federal habeas statute and demonstrates that Congress in those amendments adopted the de novo standard for review of federal constitutional issues. The brief also provides important argument and statistical data, not presented elsewhere, showing that there have been no "changed circumstances" that would warrant the adoption of a deference standard of review.

For these reasons, amici curiae respectfully request leave to file the accompanying brief.

Respectfully submitted,

James S. Liebman
Columbia University
School of Law
435 West 116th St.
Box B-16
New York, N.Y. 10027

Douglas G. Robinson*
Julia E. Sullivan
1440 New York Ave., N.W.
Washington, D.C. 20005
(202) 371-7000

Counsel for Amici Curiae

*Counsel of Record

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BRIEF AMICI CURIAE OF BENJAMIN R. CIVILETTI, NICHOLAS deB. KATZENBACH, EDWARD H. LEVI, ELLIOT L. RICHARDSON, et al. IN SUPPORT OF THE RESPONDENT

The individuals listed on the inside front page, as amici curiae, submit this brief, pursuant to Rule 37 of the Court's rules, to assist the Court in determining the appropriate standard of review on habeas corpus of a state court's application of existing federal constitutional

law to specific facts. For the reasons stated herein, that review should continue to be de novo.

STATEMENT OF INTEREST OF AMICI CURIAE

This brief is filed on behalf of 66 individuals. They include former Attorneys General of the United States and of several states, former state and federal trial and appellate judges, former Governors, Senators and Representatives, and former prosecutors. They include practicing attorneys, law school deans and professors, and community leaders in other professions. They are men and women, Democrats and Republicans, supporters and opponents of the death penalty. Most importantly, they reflect an extraordinary depth and breadth of experience in every aspect of our criminal justice system. Despite the diversity of their backgrounds and their political perspectives, they are

united in their belief that the federal courts have, and should retain, plenary authority to determine whether a state prisoner's federal constitutional rights have been violated.

SUMMARY OF ARGUMENT

I. The revisions to the habeas corpus statute that Congress adopted in 1966 incorporated what by then was the well-entrenched rule of plenary habeas review. Having explicitly and with precision defined in those amendments certain limits to plenary federal court jurisdiction, Congress could not reasonably have meant, at the same time, to give the federal courts authority to declare additional and even more sweeping exceptions. The legislative history of the 1966 amendments, including Congress' intensive consideration, then rejection, of proposals to require habeas courts to defer to state

court determinations of federal constitutional law, confirms Congress' commitment to a rule of de novo review. The Court's adoption of a different rule here would seriously intrude on the constitutional role of Congress, particularly when the very issue before the Court is still being actively debated in Congress.

II. Because the Court has consistently adhered to a de novo review standard for nearly four decades, stare decisis also emphatically counsels against changing that rule now.

III. Even if "changed circumstances" somehow could empower the Court to substitute its policy choices for those made by Congress, circumstances have not changed. As in 1966, achievement of Congress' goals of remedying and deterring constitutional violations requires the enlistment of the lower federal judiciary in providing the

same independent review that the Court would, but in practice cannot, provide on direct review. Constitutional violations unremedied at the state court level continue at the same rate today as they did in 1966. The elimination of most federal habeas jurisdiction would substantially expand this Court's certiorari docket and increase pressure on this Court to grant certiorari in a far greater number of direct appeal cases. Moreover, a deference rule would not reduce the burden on lower federal judges or reduce conflict between federal and state judges.

ARGUMENT

I. The Habeas Statute Requires De Novo Federal Review of Questions of Constitutional Law.

Before the Court can decide whether a federal court should defer to a state court's application of the law to the

facts, it first must ask whether it can defer. Under any principled analysis of the federal habeas statute, the answer to that threshold question must be no. In 1966 Congress adopted the de novo review requirement as part of a comprehensive statutory scheme for federal habeas review. The Court is not now free to ignore Congress' deliberate policy choice.

A. In the 1966 Amendments, Congress Adopted the De Novo Review Formulation of Brown v. Allen.

Although the briefs in support of the Petitioners barely mention it, the question before this Court is a straightforward one of statutory construction: whether Congress intended the habeas statute, especially as amended in 1966, to provide for de novo federal court review of questions of constitutional law.

The rules of statutory construction applicable to this case are well-

established. First, the Court looks to the text of a statute to ascertain Congress' meaning and intent.[1] This "intrinsic" review considers both the literal words of the applicable sections and the provisions of the statute as a whole.[2] It is also presumed in that analysis that Congress knew how the courts, and especially this Court, interpreted prior law.[3]

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[1] See, e.g., Norfolk and Western Ry. v. American Train Dispatchers Ass'n, 111 S. Ct. 1156, 1163 (1991) ("As always, we begin with the language of the statute and ask whether Congress has spoken on the subject before us.").

[2] See, e.g., King v. St. Vincent's Hosp., 112 S. Ct. 570, 574 (1991) ("we do nothing more, of course, than follow the cardinal rule that a statute is to be read as a whole, . . . since the meaning of statutory language, plain or not, depends on context") (citation omitted).

[3] See, e.g., Cannon v. University of Chicago, 441 U.S. 677, 699 (1979) ("[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents from this and other federal courts and it expected its enactment to be interpreted in conformity with them."). See also Miles v. Apex Marine Corp., 111 S. Ct. 317, 325 (1990); Thompson v. Thompson, 484 U.S. 174 (1988).

Finally, the Court may look to the "extrinsic" legislative history to resolve ambiguity or to see if it contains evidence sufficient to overcome the strong presumption in favor of the statutory text.[4]

When read in its entirety against the backdrop of this Court's interpretation of prior law, the federal habeas statute clearly reveals that Congress intended to include a de novo review standard when it amended the statute in 1966. When, in addition, the legislative history of the 1966 amendments is reviewed, any remaining doubt regarding Congress' intent is eliminated.

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[4] See, e.g., INS v. Cardoza-Fonseca, 480 U.S. 421, 432 n.12 (1987).

1. By 1966, This Court Had Unequivocally Interpreted the 1867 Habeas Statute to Require De Novo Review.

The briefs filed in support of the Petitioners contend that this Court's decision in Brown v. Allen, 344 U.S. 443 (1953), was a radical departure from precedent.[5] That, however, is not the issue here. The issue is what Congress understood existing law to be when it legislated in 1966.

On that issue, there can be no dispute. The Court in Brown unmistakably interpreted the habeas statute as conferring on the federal courts the obligation to review and decide questions of law de novo, including mixed questions of law and

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[5] E.g., Brief of Amicus Curiae Criminal Justice Legal Foundation in Support of Petitioner ("CJLF Br.") at 2-14.

fact.[6] Moreover, Brown was not an isolated decision. By 1966, the de novo rule was firmly entrenched not only by Brown but by numerous additional cases in which the Court either explicitly or implicitly applied the de novo review standard.[7]

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[6] The "de novo review" rule is clearly stated in Justice Frankfurter's opinion. See 344 U.S. at 506. CJLF claims that Justice Frankfurter's opinion did not speak for the Court on this point and is inconsistent with Justice Reed's opinion. CJLF Br. at 14. No inconsistency exists. Justice Reed clearly stated that state court opinions deserve no more weight than other non-binding authority, 344 U.S. at 458, and he just as clearly made his own de novo examination of the legal issues in that very case. Id. at 466-87. Moreover, the Frankfurter opinion says that it is "designed to make explicit and detailed" the matters dealt with in the Reed opinion and that "[t]he views of the Court on these questions may thus be drawn from the two opinions jointly." Id. at 497. It is unrealistic for CJLF to think either that Justice Frankfurter misrepresented the significance of his opinion or that the other members of the Court would have ignored such a misrepresentation.

[7] See, e.g., Townsend v. Sain, 372 U.S. 293, 318 (1963) ("Although the district [court] judge may, where the state court has reliably found the relevant facts, defer to the state court's findings of fact, he may not defer to its findings of law. It is the district judge's duty to apply the applicable federal law to the state court fact findings

(Footnote continued)

2. The Statutory Text Reveals an Intent to Require De Novo Federal Review.

In Brown, the Court relied primarily on the language of 28 U.S.C. § 2243 to hold that federal courts are required to determine independently whether the Constitution has been violated and, if so, to issue the writ.[8] When Congress amended the statute in 1966, it did not change the

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(Footnote 7 continued from previous page)

independently."). For applications of this standard between 1953 and 1966, see, e.g., Sheppard v. Maxwell, 384 U.S. 333 (1966); Pate v. Robinson, 383 U.S. 375 (1966); Boles v. Stevenson, 379 U.S. 43 (1964) (per curiam); Fay v. Noia, 372 U.S. 391 (1963); Gideon v. Wainright, 372 U.S. 335 (1963); Irvin v. Dowd, 366 U.S. 717, 723 (1961); Rogers v. Richmond, 365 U.S. 534 (1961); Douglas v. Green, 363 U.S. 192 (1960); United States ex rel. Jennings v. Ragen, 358 U.S. 276 (1959); Massey v. Moore, 348 U.S. 105 (1954); Leyra v. Denno, 347 U.S. 556 (1954); United States ex rel. Smith v. Baldi, 344 U.S. 561 (1953).

[8] See 344 U.S. at 460-61 (opinion of Reed, J.) ("The Code directs a court entertaining an application to award the writ," citing section 2243); id. at 505 (opinion of Frankfurter, J.) ("Section 2243 commands the judge 'entertaining' an application to award the writ or issue an order to show cause 'unless it appears from the application that the applicant . . . is not entitled thereto.'").

language of section 2243 or otherwise suggest that it disagreed with the Court's interpretation of that section.[9] To the contrary, Congress added certain provisions to the statute that reveal Congress' intent to perpetuate the de novo review requirement by embedding it within the overall jurisdictional scheme. Those provisions deal directly and in a comprehensive way with the very subject at issue here -- the scope of federal court review of petitions filed by state prisoners. Together, they evidence a clear underlying premise that federal review of legal issues is plenary.

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[9] See Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 474 U.S. 494, 501 (1986) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.").

First, Congress added section 2254(d). That provision establishes a presumption of correctness for state court findings of fact that are not clearly erroneous and that are made after a "full, fair and adequate" hearing free of procedural irregularities. Glaringly absent from the 1966 amendments is any similar presumption of correctness for questions of law.

Congress also added section 2244(b), which deals with second or subsequent habeas petitions of state prisoners and gives preclusive effect (subject to exceptions not relevant here) to the prior decisions of a federal habeas court on questions of both fact and law. Also added was section 2244(c), which provides that decisions of this Court on the merits of state prisoners' claims "shall be conclusive as to all issues of fact or law"

and cannot be raised in any subsequent federal habeas petition, even a first one. The contrast between these two subsections and section 2254(d) is striking: When Congress intended to apply a less-than-de-novo standard of review to questions of law as well as fact, it made that intention explicit.

These three additions to the statute are all limitations on or exceptions to plenary federal court review. By enacting the exceptions, Congress also necessarily adopted the general rule to which the exceptions applied. Any other interpretation of the statute as it was amended in 1966 would lead to the improbable conclusion that, having explicitly and with precision defined certain limits to plenary federal court jurisdiction, Congress at the same time intended to let the federal

courts declare additional exceptions.[10] It simply is not plausible that Congress, after carefully crafting the precise circumstances under which a federal court was to defer to state court factual findings, left entirely to the discretion of the courts a similar rule of deference for state court legal conclusions.[11]

3. The Legislative History Leaves No Doubt That Congress Intended to Retain De Novo Review.

The legislative history of the 1966 amendments confirms that Congress meant to

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[10] Absent a result so "bizarre" or "absurd" that Congress "'could not have intended' it," the Court may not declare exceptions to the statutory mandate. Demarest v. Manspeaker, 111 S. Ct. 599, 604 (1991) (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982)); see also United States v. Rutherford, 442 U.S. 544, 552 (1979).

[11] See Patsy v. Florida Bd. of Regents, 457 U.S. 496, 507-12 (1982) (when Congress adopted a specific exhaustion requirement for civil rights claims brought by institutionalized persons under 42 U.S.C. § 1983, it intended to leave standing the judicially-established rule that exhaustion is not required in such suits generally).

perpetuate the prevailing standard of de novo review. Between 1955 and 1966, fourteen bills were introduced in Congress to revise the habeas statute, several of which would have overruled the independent federal review principle of Brown v. Allen.[12] In the hearings, reports and debates on these bills, Congress thoroughly considered the very same objections to de novo review that the briefs in support of the Petitioners raise here.[13] In the end, Congress rejected efforts to overrule Brown. Instead, it enacted a comprehen-

[12] The legislative history is replete with discussion of the Court's decision in Brown. See, e.g., 102 Cong. Rec. 936 (1956); Hearings Before Subcommittee No. 3, House Judiciary Comm., 84th Cong., 1st Sess. 2 (1955) (hereinafter Hearings I); H.R. Rep. No. 1200, 84th Cong., 1st Sess. 2, 7, 16, 19 (July 18, 1955); H.R. Rep. No. 293, 85th Cong., 2d Sess. 2, 16, 21 (Jan. 23, 1958).

[13] See, e.g., Hearings I at 5-10, 17-18, 62, 95, 113-14; H.R. Rep. No. 1293, 85th Cong., 2d Sess. 2-3, 5-6 (1958); 104 Cong. Rec. 17336 (1958); 104 Cong. Rec. 19343 (1958).

sive jurisdictional scheme that not only adopted, but has as its foundation, plenary federal court review.

a. The Parker Proposal

Shortly after Brown was decided, the Judicial Conference of the United States proposed to Congress the so-called "Parker bill,"[14] which was a frontal attack on Brown. The Parker bill would have prohibited habeas review in a lower federal court when issues of fact and law had been given (or could still be given) a "fair and adequate" hearing in the state courts.[15]

[14] The proposal took its name from Chief Judge John J. Parker of the Fourth Circuit, Chair of the Judicial Conference's Special Committee on Habeas Corpus.

[15] Under the Parker bill, a state prisoner could still have obtained de novo review of federal constitutional claims by filing an original application for a writ of habeas corpus in this Court. See 1963 Report of the Judicial Conference Committee on Habeas Corpus, 33 F.R.D. 363, 370 (1963); H.R. Rep. No. 548, 86th Cong., 1st Sess. 17 (1959).

The language used by the Judicial Conference in support of the Parker bill struck precisely the same themes that the briefs in support of the Petitioner urge on the Court here. The proponents of the bill thought that changes were needed so that "the principles of comity between State and Federal courts [could be] more effectively applied," and "a proper balance between the Federal and State courts restored."[16] In particular, it was said repeatedly that the Parker bill would:

> eliminate the delays and interference with the State criminal law and the consequent resentment on the part of judges of the several States which have arisen through the review by habeas corpus in the lower Federal courts of the judgments of the State courts.

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[16] H.R. Rep. No. 1293, 85th Cong., 2d Sess. 13 (1958); 102 Cong. Rec. 937 (1956) (statement of Representative Murray).

H.R. Rep. No. 1200, 84th Cong., 1st Sess. 5 (1955).[17]

The Parker proposal was first introduced in the House in 1955[18] and was reintroduced at least six times thereafter. It passed the House in 1956 and again in 1958 with strong endorsements from the associations of state court chief justices and state attorneys general.[19]

When the legislation reached the Senate in 1958, however, opposition had begun to mount. In addition to fears that serious constitutional violations would go uncorrected, practical concerns were expressed. For example, members of this

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[17] See also sources cited supra note 12.

[18] H.R. 5649, 84th Cong., 1st Sess. (1955).

[19] 102 Cong. Rec. 936 (1956); 104 Cong. Rec. 4675 (1958); see Hearings I at 11, 27, 31, 54, 114-15, 117; H.R. Rep. No. 1200, 85th Cong., 1st Sess. 1 (1955).

Court warned that the burden on the Court to correct state court errors would be too great. See 33 F.R.D. at 371. The Justice Department, which originally endorsed the Parker bill, later opposed it because, among other things, it would impose on federal district judges the burden of reviewing an entirely new issue -- whether the "fair and adequate hearing" standard had been met in particular cases. See Justice Department Memorandum -- H.R. 8361: Federal Habeas Corpus for State Prisoners, reprinted in 104 Cong. Rec. 19342-44 (1958). Faced with such opposition, the Senate withheld action on the bill in 1958.

b. **The 1959 Proposal**

The Judicial Conference returned to Congress in 1959 with a radically changed proposal. The new Judicial Conference

bill, introduced as H.R. 6742, proposed amending Section 2254 to provide that only a specially convened three-judge federal district court could grant the habeas petition of a state prisoner. It also proposed adding what in essence are now subsections (b) and (c) of Section 2244.[20]

Significantly, gone from the 1959 proposal was the Parker bill's wholesale overruling of Brown v. Allen. Except as modified by the proposed changes in Section 2244, H.R. 6742 left intact the notion that federal court review of state prisoner habeas petitions was plenary.

H.R. 6742 was endorsed by an array of legal organizations, as well as the Justice Department, and reported by a unanimous Judiciary Committee.[21] Most of the

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[20] See H.R. 6742, 86th Cong., 1st Sess. (1959).

[21] H.R. Rep. No. 548, 86th Cong., 1st Sess. 1 (1959).

debate on the bill centered on its proposal for three-judge courts. Proponents and opponents alike, however, expressed an understanding that the bill gave those courts the same plenary habeas jurisdiction that single district judges had exercised at least since Brown.

For example, when asked whether the three-judge court provision would change the standard of review in habeas proceedings, Judge Orie Phillips, Chairman of the Judicial Conference's habeas committee, responded: "I do not think that changes present practice." Habeas Corpus: Hearings Before Subcomm. No. 3 of the House Comm. on the Judiciary, 86th Cong., 1st Sess. 18 (1959). Chief Justice Weygandt of the Ohio Supreme Court, chairman of the Conference of Chief Justices, opposed the 1959 Judicial Conference proposal for that very reason:

> The present complicated . . . bill accomplishes none of the objectives sought by the Conference of Chief Justices. In fact, it does the opposite in that it would afford permanent statutory approval of the misuse of the writ resulting from the decisions of the Federal Supreme Court.

105 Cong. Rec. 14636 (1959) (emphasis added). Objections like that of Judge Weygant were rejected, however, and the bill passed the House by unanimous consent. Id. at 14637. Again the Senate took no action.

c. The 1963 Proposal

In 1963, the Judicial Conference again proposed habeas reform legislation. It was persuaded to do so for two reasons. First, the Parker bill had been reintroduced, and the Judicial Conference was concerned that the bill would pass if no alternative was offered. See 33 F.R.D. at 377. Second, in March 1963 this Court handed down Gideon, Townsend and Fay v.

Noia, decisions that caused a significant increase in the number of habeas petitions filed in the federal courts and renewed calls for habeas reform. Id. The Judicial Conference feared that legislation would be proposed in reaction to Townsend that would make state court findings of fact conclusive, even when the proceedings in which such findings were made were not fair or adequate. Id. at 376, 378.

In response, the Judicial Conference again offered its 1959 proposal, but with a significant change. As a compromise on the Townsend issue, the bill added the "presumption of correctness" concept for factual findings that now is embodied in section 2254(d). Id. at 381. The House Judiciary Committee thereupon substituted the 1963 Judicial Conference proposal for the Parker bill, and the House passed the

measure in 1964.[22] Once again, however, no action was taken in the Senate.

d. **The 1966 Amendments**

The 1963 Judicial Conference proposal was introduced again in 1965. Prior to action in the House, however, the Judicial Conference concluded that the three-judge court proposal "might lead to serious problems of administration."[23] The Judicial Conference accordingly returned full circle to review by a single district judge, as under existing law.

The 1965 Judicial Conference proposal was approved without significant change by the House and Senate Judiciary Committees

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[22] H.R. Rep. No. 1384, 88th Cong., 1st Sess. (1964); 110 Cong. Rec. 14684 (1964).

[23] 1965 Report of the Committee on Habeas Corpus of the Judicial Conference, reprinted in H.R. Rep. No. 1892, 89th Cong., 2d Sess. 13 (1966).

in 1966[24] and this time secured the approval of both houses.[25] It was signed into law by President Johnson on November 2, 1966. Pub. L. 89-711, 80 Stat. 1105.

The entire 13-year debate that resulted in the 1966 amendments was focused on precisely the question that the Court posed in its certiorari order: whether there should be limits on the plenary authority of lower federal habeas courts to overrule state court determinations of federal constitutional issues. After a circuitous journey involving serious consideration of proposals to strip federal habeas courts of their independent review

[24] H.R. Rep. No. 1892, 89th Cong., 2d Sess. (1966); S. Rep. No. 1797, 89th Cong., 2d Sess. (1966).

[25] 112 Cong. Rec. 21756 (1966) (House); id. at 27974 (1966) (Senate).

power, Congress ultimately came back to the de novo review standard. Whatever might be said of the wisdom of that choice, it cannot be denied that it was consciously and deliberately made.

It was neither necessary nor logical for Congress to restate the de novo review interpretation of Brown in order to incorporate it into the 1966 amendments. Congress made a thorough examination of the Court's interpretation of prior law and decided to leave it intact, save for three clearly defined exceptions. In these circumstances, no other conclusion can be drawn but that Congress specifically intended to perpetuate the de novo review standard in the statute.[26] See NLRB v. Gullett Gin Co., 340 U.S. 361, 366 (1951)

[26] What the CJLF calls congressional "silence," CJLF Br. at 18, thus was in fact a conscious congressional decision to leave the established law alone.

(Congress is presumed to have adopted prior interpretations of law when they were "considered in great detail" during reenactment).[27]

[27] The limitations the Court has applied to search and seizure, successive, procedurally defaulted, and new-law claims do not constitute judicial exceptions to the clear statutory scheme. In each of those areas, the Court either (1) carefully avoided impinging on the habeas statute, see Stone v. Powell, 428 U.S. 465, 495 n.37 (1976) ("Our decision today is not concerned with the scope of the habeas statute"), (2) applied an existing statutory restriction, see McCleskey v. Zant, 111 S. Ct. 1454, 1465 (1991) (applying 28 U.S.C. § 2244), or (3) effectuated Congress' mandate to give habeas petitioners the same level of review (but no more than) they would have received from the Court on direct appeal certiorari, see Wainwright v. Sykes, 433 U.S. 72, 78-79, (1977) (procedural default doctrine applies same restrictions on habeas as Court employs on direct review under "adequate and independent state ground" doctrine); Teague v. Lane, 489 U.S. 288, 295 (1989) (restricting habeas petitioners to "existing" law as of time when Court denied their direct appeal certiorari petitions). These cases have not undermined the rule that state court constitutional determinations are reviewed de novo on habeas and reversed whenever those determinations are found to be incorrect. See, e.g., Penry v. Lynaugh, 492 U.S. 302, 314-15 (1989).

B. The Adoption of a Deference Rule by Judicial Fiat Would Seriously Intrude upon the Constitutional Prerogative of Congress.

Certainly Congress has the authority under the Constitution to make federal courts the ultimate arbiters of federal constitutional issues.[28] In 1966, after years of thorough consideration, it did exactly that.[29]

Once Congress acted, this Court became obligated under our constitutional form of government to respect Congress' choice. The bedrock constitutional principle of separation of powers dictates that the Court's "individual appraisal of

[28] See U.S. Const. art. III, § 1.

[29] See Kuhlmann v. Wilson, 477 U.S. 436, 449 (1986) (plurality opinion) ("In 1966, Congress carefully reviewed the habeas corpus statutes and amended their provisions" with legislation that "weigh[ed] the interests of the individual prisoner against the sometimes contrary interest of the State").

the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute." TVA v. Hill, 437 U.S. 153, 194 (1978).

But even more is at issue here than respecting the policy choices made by Congress 25 years ago. Since then, Congress has repeatedly considered proposals for habeas "reform."[30] That debate reached a crescendo in the last session of the current Congress, when a "deference" standard much like that at issue here passed the Senate but could not garner a majority in the House.[31]

Having lost this latest round in Congress, the Petitioners and their supporting amici seek to shift the debate to this Court. The Court's response should be that they are now in the wrong forum.

To begin with, the Petitioners premise their entire presentation on policy arguments -- arguments that the political branches are both constitutionally designated and better equipped to resolve. As Justice O'Connor has said in a similar context, "the matter is one of legislative choice based on difficult policy considerations . . . . Our decision today rightly leaves these issues to resolution by Congress and the state legislatures." Murray v. Giarratano, 492 U.S. 1, 13 (1989) (concurring opinion).

The legislative branch is likewise more capable than the Court of dealing comprehensively with these policy matters. For example, when Congress in the last session considered giving deference to

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[30] See Brief for Members of Congress in Support of Respondent at 9-16.

[31] See CJLF Br. at 20.

state courts on legal questions, it did so in the context of numerous proposals for habeas reform, including, most importantly, proposals to improve the quality of legal representation in state court proceedings. This Court, on the other hand, can deal only with the piece of the puzzle that is before it. As Justice Kennedy has said, "[j]udicial imposition of a categorical remedy . . . might pretermit other responsible solutions being considered in Congress and state legislatures . . . . Unlike Congress, this Court lacks the capacity to undertake the searching and comprehensive review called for in this area." Id. at 14 (concurring opinion).

Judicial restraint is important here, in addition, because the federal courts' jurisdiction to determine federal questions is a matter that the Constitution, in one of its drafters' most delicately

calibrated compromises, left explicitly to the political branches. See U.S. Const. art. III, § 1. Because the Constitution allocates responsibility to Congress to define the federal courts' jurisdiction, and because the question implicates the Court's self-interest, a scrupulous adherence to the jurisdiction that the political branches have designed is imperative.[32]

Nor may it be presumed that Congress is any less sensitive to state interests than the Court is. After all, the constituency on whose behalf changes in existing habeas law are sought is especially well represented in Congress.[33] That

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[32] See Henry P. Monaghan, The Burger Court and "Our Federalism", 43 L. & Contemp. Prob. 39, 49 (1980).

[33] See Lawrence Gene Sager, Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts, 95 Harv. L. Rev. 17, 51 (1981) ("Congress retains a

(Footnote continued)

these elected representatives have thus far decided against tipping the scales more in the states' favor should make the Court chary of doing so itself.

Finally, and most importantly, the court's own institutional integrity is at stake. Were it to adopt the suggested deference rule, it would be engaging in judicial activism in its rankest form, not only ignoring the existing statute but snatching from the legislative branch in mid-debate its prerogative to re-strike the delicate balance between federal and state interests. This Court's constitutional obligation is, instead, to let the elected representatives of the people make these difficult choices.[34]

(Footnote 33 continued from previous page)
deep sensitivity -- or as some would have it, a bias -- toward the interests of the states").

[34] See Bob Jones Univ. v. United States, 461 U.S. 574, 622 (1983) (Rehnquist, J., dissenting) ("this Court should not legislate for Congress"); see
(Footnote continued)

II. Stare Decisis Also Prevents the Court from Abandoning De Novo Review.

Even if this were not a case in which Congress clearly and affirmatively adopted the de novo review standard, stare decisis would nevertheless dictate that the Court not reverse its own long-established precedent. "Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." Patterson v. McLean Credit Union, 491 U.S. 164, 172-73 (1989).

(Footnote 34 continued from previous page)
also ROBERT BORK, THE TEMPTING OF AMERICA, THE POLITICAL SEDUCTION OF THE LAW 141 (Touchstone ed. 1990) ("It is as important to freedom to confine the judiciary's power to its proper scope as it is to confine that of the President, Congress, or state and local governments. Indeed, it is probably more important, for only courts may not be called to account by the public.").

De novo review has been the unwavering rule of this Court for decades, both before and after the 1966 amendments. In Sumner v. Mata, 449 U.S. 539 (1981), the Court noted the extensive historical foundations of the rule:

> It has long been established, as to those constitutional issues which may be raised under § 2254, that even a single federal judge may overturn the judgment of the highest court of a State insofar as it deals with the application of the United States Constitution or laws to the facts in question. As might be imagined, this result was not easily arrived at under the Habeas Corpus Act of 1867, the predecessor to 28 U.S.C. § 2254. But the present doctrine, adumbrated in the Court's opinion in Moore v. Dempsey, 261 U.S. 86 (1923), and culminating in this Court's opinion in Fay v. Noia, 372 U.S. 391 (1963), is that the Act of 1867 allows such collateral attack.

Id. at 543-44.[35] De novo review has consistently been the standard applied by the Court, even as recently as the current term. Estelle v. McGuire, 112 S. Ct. 475 (1991) (de novo review of whether admissibility of evidence or jury instruction violated due process).

In Miller v. Fenton, the Court emphasized the importance of adhering to stare decisis when it comes to modifying plenary federal habeas review:

> We note at the outset that we do not write on a clean slate. "Very weighty considerations underlie the principle that courts should not lightly overrule past decisions." Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970). Thus, even assuming that contemporary considerations supported respondent's construction of the statute, nearly half a century of unwavering precedent weighs heavily against any suggestion that we now disregard the settled rule in this area.

Id. at 115 (emphasis added).

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[35] See also Miller v. Fenton, 474 U.S. 104, 112 (1986) ("the ultimate question whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible with the requirements of the Constitution is a matter for independent federal determination"); Sumner v.

(Footnote continued)

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Mata, 455 U.S. 591, 597 (1982) (per curiam); Rose v. Mitchell, 443 U.S. 545, 561 (1979).

The stare decisis considerations that dictated the result in Miller v. Fenton apply even more forcefully in this case, because here a long line of Court precedent is coupled with frequent congressional review of the very same subject. In commenting on "the presumption of stability in statutory interpretation," this Court has said:

> We are especially reluctant to reject this presumption in an area that has seen careful, intense, and sustained congressional attention. If there is to be an overruling of the [Court's prior interpretation], it must come from Congress, rather than from this Court.

Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 424 (1986) (emphasis added).

This is, in short, a classic instance in which principled decision-making requires exercise of the judicial restraint inherent in stare decisis. If public respect for the law is to be fostered, a

change as profound as that contemplated here, in such a long and unwavering line of precedent, should be made, if at all, only by Congress.

III. The Policies That Prompted De Novo Review Remain Fully Valid Today.

The Petitioners and their amici do not even pretend to interpret the statute, though that is where analysis should begin and end. Even on their own "changed circumstances" ground, however, the Petitioners cannot prevail. The same four policy considerations that caused Congress to perpetuate de novo review in 1966 apply with equal force today. In addition, policies the Petitioners cite in support of a deference rule -- principally, the need for expeditious habeas procedures and to avoid conflict between federal and state courts -- in fact counsel against that rule.

A. **The Remedial Function**

A principal reason for de novo habeas review is the need to cure the significant number of serious constitutional violations that state courts fail to correct.[36]

Proponents of a change in the de novo rule argue that state judges today are better educated and informed than they were 25 years ago. Such changes, however, have not in fact reduced the need for federal habeas review. The rate of habeas grants is as high today as it ever was, and is especially high in capital cases.

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[36] See, e.g., Saffle v. Parks, 110 S. Ct. 1257, 1260 (1990); Preiser v. Rodriguez, 411 U.S. 475, 497-98 (1973) ("Federal habeas corpus . . . serves the important function of . . . preserving for the state prisoner an expeditious federal forum for the vindication of his federally protected rights, if the State has denied redress."); H.R. Rep. No. 1892, 89th Cong., 2d Sess. 9 (1966) (1966 legislation "provides adequate remedies by habeas corpus to State prisoners and thereby safeguards the constitutional rights of such prisoners.).

In all federal habeas cases, relief is granted today in the same proportion (between 3 and 4 percent) as it was in 1966. Appendix A, Table I.[37] In capital cases since 1976 (when the death-penalty moratorium was lifted[38]) the federal courts have found reversible constitutional error in 42 percent of all state judgments. Appendix B, Table I. Stated differently, since 1976, federal habeas review has prevented 149 prisoners from being executed on the basis of constitutionally flawed convictions or death sentences.[39] Id.

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[37] This percentage is higher than it was at the time of Brown v. Allen, when only 1.8 percent of all applications were granted. See 344 U.S. at 498 (opinion of Frankfurter, J.) (in the seven prior years, federal courts granted 67 of 3,702 habeas applications).

[38] See Gregg v. Georgia, 428 U.S. 153 (1976).

[39] The rate of reversible constitutional error found on habeas review of state capital judgments has remained constant over the period -- 42 per-

(Footnote continued)

The difference between life and death in most of these cases was the availability of independent federal review of just the sort that a deference rule would preclude. Amici conducted a detailed study of the Georgia capital cases in which habeas relief was granted, singling out the ones in which a rule of deference would likely have forbidden relief -- i.e., cases in which the state courts (1) had the same law and facts before them as the federal courts, and (2) adjudicated the constitutional claim employing all due corrective procedures, without any indication of "bad faith" decision-making. The study reveals that a deference rule probably would have precluded relief in fully

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cent between 1976 and 1984 and 41 percent between 1985 and 1991. The annual rate has never gone below 28 percent. Appendix B, Table II.

70 percent (32/46) of the cases in which the federal courts found reversible constitutional error. Appendix B, Table IV.

A few recent examples will suffice to show that egregious violations still routinely survive direct review and state post-conviction proceedings without correction:

In Pilchak v. Camper, 935 F.2d 145, 146-47 (8th Cir. 1991), the court granted relief because defense counsel, who was suffering from Alzheimer's disease, rendered ineffective assistance and because the investigating sheriff handpicked the jury venire. In Brown v. Lynaugh, 843 F.2d 849 (5th Cir. 1988), relief was granted because the presiding judge left the bench, took the witness stand and

provided the prosecution's principal evidence against the defendant.[40]

In McDowell v. Dixon, 858 F.2d 945 (4th Cir. 1988), cert. denied, 489 U.S. 1033 (1989), the capital conviction of a dark-skinned black defendant was reversed because the prosecutor had withheld three eye-witness statements that the assailant was white. In Horton v. Zant, 941 F.2d 1449, 1462 (11th Cir. 1991), a death sentence was reversed because the defense attorney conducted no investigation of mitigating circumstances and argued in summation that "the one you judge is . . .

[40] See also, e.g., Rivera v. Dept. of Corrections, 915 F.2d 280 (7th Cir. 1990) Henderson v. Lockhart, 864 F.2d 1447 (8th Cir. 1989) Burge v. Butler, 867 F.2d 247 (5th Cir. 1989); United States ex rel. Alerte v. Lane, 725 F. Supp. 936, 940 (N.D. Ill. 1989), appeal dismissed, 898 F.2d 69 (1990); Quartararo v. Fogg, 679 F. Supp. 212 (E.D.N.Y.), aff'd, 849 F.2d 1467 (2d Cir. 1988).

a worthless man. . . . [I] hate my client."[41]

[41] Other egregious instances of prosecutorial misconduct in capital cases, including knowing presentation of false evidence and suppression of decisive exculpatory evidence, include, e.g., Lewis v. Lane, 832 F.2d 1446 (7th Cir. 1987), cert. denied, 488 U.S. 829 (1988); Bowen v. Maynard, 799 F.2d 593 (10th Cir.), cert. denied, 479 U.S. 962 (1986); Brown v. Wainwright, 785 F.2d 1457 (11th Cir. 1986); Lindsey v. King, 769 F.2d 1034 (5th Cir. 1985); Chaney v. Brown, 730 F.2d 1334 (10th Cir.), cert. denied, 469 U.S. 1090 (1984); Troedel v. Wainwright, 667 F. Supp. 1456 (S.D. Fla. 1986), aff'd, 828 F.2d 670 (11th Cir. 1987); Miller and Jent v. Wainwright, Nos. 86-98-Civ.-T-13 and 85-1910-Civ.-T-13 (M.D. Fla. Nov. 13, 1987) (unpublished decision on file with the United States District Court for the Middle District of Florida). Egregious capital cases involving ineffective assistance of counsel include, e.g., Cunningham v. Zant, 928 F.2d 1006 (11th Cir. 1991); Loyd v. Smith, 899 F.2d 1416 (5th Cir. 1990); Chambers v. Armontrout, 885 F.2d 1318 (8th Cir. 1989), cert. denied, 111 S. Ct. 369 (1990); Harris v. Dugger, 874 F.2d 756, 763 (11th Cir.), cert. denied, 443 U.S. 1011 (1989); Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986); Jones v. Thigpen, 788 F.2d 1101 (5th Cir. 1986), cert. denied, 479 U.S. 1087 (1987); Ruffin v. Kemp, 767 F.2d 748 (11th Cir. 1985); Tyler v. Kemp, 755 F.2d 741 (11th Cir.), cert. denied, 474 U.S. 1026 (1985); House v. Balkcom, 725 F.2d 608 (11th Cir.), cert. denied, 469 U.S. 870 (1984); Young v. Zant, 677 F.2d 792 (11th Cir. 1982), cert. denied, 464 U.S. 1057 (1984).

In none of these cases do the federal court decisions suggest that the state courts employed improper procedures or acted in bad faith in reaching the conclusion that no constitutional violations occurred. Under a deference standard, therefore, all of these egregious violations would have gone uncorrected.

B. The Deterrence Function

At the same time as it would leave serious constitutional errors uncorrected, a deference standard also would increase the number of cases in which such errors occur. For, by design, plenary federal habeas review deters constitutional violations from being committed or condoned by state courts.[42]

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[42] See S. Rep. No. 1797, 89th Cong., 2d Sess. 3 (1966) ("the proposed legislation, if enacted, will be a strong inducement . . . to the state courts in criminal proceedings to safeguard the constitutional rights of defendants") (citation omitted); Butler v. McKellar, 110 S. Ct. 1212,
(Footnote continued)

Confirming Congress' and the courts' longstanding faith in the deterrence value of independent federal review are the statements of state judges and law enforcement officials themselves. As one state supreme court justice testified in Congress last year, "the presence of potential federal review is a significant impetus for improving state . . . review processes."[43]

(Footnote 42 continued from previous page)
1217 (1990) ("'"the threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards."'" (quoting Teague v. Lane, 489 U.S. 288, 306 (1989), quoting Desist v. United States, 394 U.S. 244, 262-63 (1969) (Harlan, J. dissenting))).

[43] Prepared statement of Christine M. Durham, Justice, Utah Supreme Court, before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary on July 17, 1991, at 5 (on file with the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary). See also Robert Sheran, Chief Justice, Minnesota Supreme Court, State Courts and Federalism in the 1980s: Comment, 22 Wm. & Mary L. Rev. 789, 790 (1981) (increases in federal ha-
(Footnote continued)

Data from amici's study of capital cases provide additional evidence that independent habeas review can have a dramatic deterrent effect. Between 1981 and 1986, the Fifth Circuit found reversible constitutional error in 80 percent of the Mississippi capital judgments it reviewed, compared to 22 percent, for example, of Louisiana capital judgments. Since 1986, however, the Fifth Circuit has found no constitutional error in its Mississippi cases. Appendix B, Table V. The data suggest an explanation. After some years of feedback from the federal courts about

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beas are "most frequently" prompted by the "failure or . . . refusal by state courts to fulfill the obligation . . . to enforce and respect federal law"); Letter from Judge Bruce R. Thompson to Senator Sam Ervin (Sept. 27, 1972) (discussed in Note, Proposed Modification of Federal Habeas Corpus for State Prisoners -- Reform or Revocation?, 61 Geo. L.J. 1221, 1251-52 & n.204 (1973)); Hon. Walter V. Schaefer, Federalism and State Criminal Procedure, 79 Harv. L. Rev. 1, 24 (1956).

the high level of error affecting Mississippi capital judgments, the Mississippi Supreme Court began giving more attention to direct appeal capital cases, doubling its reversal rate from 28 percent between 1978 and 1984 to 57 percent since then.[44] The decline in the federal courts' reversal rate in Mississippi cases followed directly.

C. The Independent Review Function

It has long been recognized that federal habeas review assures that a state prisoner's federal constitutional claims will be heard in a forum free of undue local influences that sometimes affect

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[44] See NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., STATE SUPREME COURT REVERSAL DATA 1976-1991 (unpublished data on file with NAACP Legal Defense and Educational Fund, Inc.). Analysis of the same federal and state data for Georgia reveals that the deterrence function of federal habeas is far from over. See infra at 57-58.

state judges.[45] Those same influences continue today to warrant independent federal habeas review.

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[45] The importance of federal court determination of federal constitutional issues free of local influences on state judges has been recognized. See, e.g., 1 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 124-25 (1911) (James Madison); The Federalist No. 81, at 522-23 (A. Hamilton) (Random House 1937); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347-48 (1816); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 377, 386-87, 415-19 (1821); Cong. Globe, 42nd Cong., 1st Sess. 460 (1871) (Rep. Coburn) ("The United States courts are further above mere local influence than the county courts; their judges can act with more independence . . . ; their sympathies are not so nearly identified with those of the vicinage; . . . they will be able to rise above prejudices or bad passions . . . more easily . . . . We believe that we can trust our United States courts, and we propose to do so"); Henry P. Monaghan, Constitutional Fact Review, 85 Colum. L. Rev. 229, 272 (1985) (tracing Court's development since 1930s of independent review of "mixed" questions "to respond to the perceived dangers of distorted . . . law application in the state courts"). Congress evidenced the same recognition in adopting the 1966 habeas amendments. See H.R. Rep. No. 1384, 88th Cong., 2d Sess. 23-25 (1964) (Judicial Conference analysis critizing proposals for deference to state court determinations as "wholly incompatible with the duty of Federal courts to determine Federal consitutional questions" and equating that duty with the Court's independent-review responsibility for "mixed" questions arising on direct appeal).

Nearly all state court judges who handle criminal cases continue to face periodic election.[46] State judges' caseloads remain comparatively high and their salaries comparatively low.[47] As Rosemary Barkett, a justice of the Florida Supreme Court, testified to Congress recently:

> Tying the hands of the federal courts in these matters of life and death may serve the interests of finality of judgment, but it . . . ignores the realities of problems in the state courts where overburdened, elected judges are responsible for maintaining a system to satisfy the needs and immediate desires of the public. Federal judges are protected by life tenure, whereas state judges are

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[46] See NATIONAL CENTER FOR STATE COURTS, STATE COURT ORGANIZATION at Tables 7, 20 (1987).

[47] See NATIONAL CENTER FOR STATE COURTS' COURT STATISTICS PROJECT, STATE CASELOAD STATISTICS: ANN. REP. 1989 at 17-21, 63-73, 99-107, 120-25 (1991) (state judges' average caseload is 3031 matters annually (356 criminal) compared to 512 matters (106 criminal) for federal judges); NATIONAL CENTER FOR STATE COURTS, 17 SURVEY OF JUDICIAL SALARIES, NO. 2 (1991) (federal trial and appellate judges earn about 50% more, on average, than state counterparts).

not.[48]

D. **The Delegation Function**

As discussed above,[49] an important consideration in Congress' abandonment of the Parker bill was the need to enlist the aid of the entire federal judiciary in correcting constitutional errors that escape the state system and in deterring additional errors from occurring. Without full federal court participation, either

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[48] Prepared Statement of Rosemary Barkett Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 102d Cong., 1st Sess. 8-9 (May 22, 1991) (on file with the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary). See Prepared Statement of Justice Christine M. Durham, supra, note 43 at 3 (there is "a structural vulnerability in the state court systems to community and special interest pressures [that] are sometimes antithetical to federal constitutional guarantees") (emphasis in original); Statement of James L. Robertson, Justice, Mississippi Supreme Court, Hearings on S. 88, S. 1757, and S. 1760 before the Senate Judiciary Committee, 101st Cong., 1st and 2d Sess. 378 (1990).

[49] See supra at 39-49.

this Court would have to increase its workload enormously or large numbers of deserving cases would go unreviewed.[50]

The same consideration applies today. If anything more than a lottery-type effort to correct erroneous state court constitutional rulings is to be made, then adoption of a deference rule would greatly increase pressure on the Court to hear cases on direct appeal -- pressure that

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[50] See, e.g., Rose v. Mitchell, 443 U.S. 545, 561 (1979) ("There is a need . . . to ensure that an independent means of obtaining review by a federal court is available on a broader basis than review only by this Court will permit"); Darr v. Burford, 339 U.S. 200, 214-15 (1950); H.R. Rep. No. 1384, 88th Cong., 2d Sess. 17, 18, 23 (1964); S. Rep. No. 1797, 89th Cong., 2d Sess. 3 (1966). See also Paul J. Mishkin, Foreword: The High Court, the Great Writ, and the Due Process of Time and Law, 79 Harv. L. Rev. 56, 86-87 (1965) ("[E]ffective enforcement of federal guarantees directed at state criminal procedures can only be had through the availability of federal habeas corpus. . . . The sheer volume of the Court's work, not to mention inadequacy of some state procedures for presenting these questions, would preclude adequate vindication of these constitutional rights.").

Justice Kennedy recently suggested does not exist now because of de novo federal habeas review.[51]

Each year state prisoners file about 10,000 habeas petitions. Of those, about 400 (4 percent) are granted. In 1988 and 1989, about 180 (2 percent) of the 10,000 petitions filed resulted in published circuit court opinions on the merits in noncapital cases, in 38 of which the writ was granted. Careful analysis reveals, moreover, that in about 90 percent (34) of the published cases in which relief was granted, a deference rule would have required the lower federal courts to deny

[51] See Spencer v. Georgia, 111 S. Ct. 2276 (1991) (Kennedy, J., concurring in the denial of certiorari) ("This case appears to present important questions of federal law, and if I thought our decision in Teague v. Lane . . . would prevent us from reaching those issues on federal habeas review, I would have voted to grant certiorari.").

relief.[52] Appendix A, Table I; Appendix C, Table I.

These data offer considerable insight into the increased workload that a deference rule would thrust on the Court. The knowledge that no habeas relief would be available almost certainly would cause prisoners to file substantially more certiorari petitions than they do now following direct appeal and state postconviction proceedings. Even if the Court somehow could limit certiorari grants to only those noncapital cases in which the lower federal courts now grant habeas relief, but in which a deference rule would in the future prohibit review, the Court still would have to increase its

[52] These 34 decisions include only ones in which no federal hearing had to be held, no new law was applied, and no indication of improper state corrective processes was present.

merits docket by 360 noncapital cases a year (400 times 90 percent). Indeed, even if the Court could perfectly target its certiorari grants to only those cases that today warrant published court of appeals opinions granting relief, its merits docket still would increase by 34 new noncapital cases a year.

Added to these numbers would be capital cases. Between 1976 and 1991, the lower federal courts granted habeas writs in 149 capital cases. Extrapolating from data showing that about 70 percent of those grants involved the application of established law to known facts (see supra at 42) and assuming that the Court could limit its certiorari grants to cases in which relief was presumably warranted, the deference rule would have enlarged this Court's merits docket by over 100 capital cases since 1976. Sixty-five of those

cases would have been added during just the last five-and-a-half years.

Even these figures underestimate the burden a deference rule would place on the Court if deserving cases are not simply to be ignored. In exercising their existing de novo review function, the lower federal courts do much more than provide relief in particular cases. In addition, they are in a position to monitor the criminal justice systems in the states within their jurisdictions, spotting and giving special scrutiny to troublesome trends as they arise.

The data revealing the special attention the Fifth Circuit had to devote to capital cases arising from Mississippi already have been described. See supra at 47-49. The Eleventh Circuit continues to respond to an even more pervasive problem in its Georgia capital cases. Put blunt-

ly, the Eleventh Circuit's nearly 50 percent rate of reversing state capital judgments is the product not of an overzealous federal bench, but rather of almost habitual constitutional violations in a single state. Thus, although the Eleventh Circuit finds constitutional error in only 18 and 38 percent, respectively, of its Alabama and Florida cases, it has had to cure reversible constitutional violations in 66 percent (46/70) of its Georgia capital cases.[53] Appendix B, Table III and V.

This Court does not have the capacity to discover and cure pervasive problems of

[53] In contrast, the Georgia Supreme Court reverses capital convictions or sentences only 26 percent of the time -- the lowest state-court reversal rate in the Eleventh Circuit and one of the lowest rates in the country (nationally, the state-court reversal rate in capital cases is 46 percent). See NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., STATE SUPREME COURT REVERSAL DATA 1976-1991, supra note 44.

this sort.[54] As Judge Posner's Subcommittee on the Role of the Federal Courts and Their Relation to the States found recently, however, the burden of habeas is manageable when spread among the entire lower federal judiciary and accordingly does not warrant a deference rule.[55]

The reality, of course, is that, if a deference rule were adopted, this Court could not even begin to perform on direct

[54] A study of the Fifth, Sixth and Seventh Circuits reveals even larger state-by-state disparities within circuits in the rate of habeas grants in noncapital cases. Appendix C, Table 2.

[55] See Report of the Subcommittee on the Role of the Federal Courts and Their Relation to the States, in 1 FEDERAL COURTS STUDY COMMITTEE, WORKING PAPERS AND SUBCOMMITTEE REPORTS 468-515 (July 1, 1990). District and circuit judges' easy access to region-specific information that is not so readily available to this Court has long been cited as one justification of habeas' enlistment of the lower federal judiciary in the independent-review function in state criminal cases. See Brown v. Allen, 344 U.S. at 458 (opinion of Reed, J.); Darr v. Burford, 339 U.S. 200, 229-31 (1950) (Frankfurter, J., dissenting).

review the functions that lower federal courts currently discharge on habeas. As a result, a rule of deference would deprive hundreds of men and women who are convicted each year in violation of the federal Constitution -- and many more who are unconstitutionally sentenced to death -- of any meaningful review and redress in any federal court. Policy aside, that outcome directly contradicts the intent of Congress in adopting the 1966 amendments. All parties to the debates leading up to the amendments agreed that independent review and redress for constitutional violations had to be available in some federal court. Even the Parker bill so provided. See supra note 15. This Court's caseload, even at that time, ultimately persuaded Congress that the lower federal courts of necessity had to be

utilized if meaningful review was to be provided.

E. Efficiency and Comity

Although the Petitioners promote the rule of deference on efficiency and comity grounds, those very policies counsel against that rule. To begin with, a deference rule would cause precisely the "proliferation of substantial interpretive litigation" that led the Judicial Conference and the Justice Department in the past to warn Congress against similar habeas reforms.[56] Prisoners as a matter of course would allege that the state court corrective process employed in their cases was unfair, unreasonable or suffused

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[56] Reports of the Judicial Conference of the United States -- Report of the Administrative Office, U.S. Courts, 1973 at 74 (U.S. Gov't Printing Office 1974). See also Department of Justice Memorandum -- H.R. 8361: Federal Habeas Corpus for State Prisoners, reprinted in 104 Cong. Rec. 19342 (Aug. 23, 1958).

with the "bad faith" of state court judges. Accordingly, judicial scrutiny of a new, fact-intensive issue would be required in virtually every case.

Equally important, as your amici who have served as state judges can attest, the prospect of having every petition and every published habeas corpus decision turn, not on whether the state court "got the law right," but rather on whether the court acted "unreasonably" or in "bad faith," would increase the friction between state and federal judges.[57] There is no sense, therefore, to the claim that time, resources and dignity could somehow be saved by replacing the time-honored and well understood distinction between law and fact with an untried and potentially insulting standard focused on the bona fides of state judges.[58]

Accordingly, even if the existing system were "broken," and even if the Court were the proper authority to fix it, a deference rule would create as many

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[57] The Teague analogy does not serve the Petitioners. Asking, as does Teague, whether state judges reasonably predicted the future direction of Supreme Court doctrine is a far less derogatory inquiry than asking whether, in mistakenly denying relief on the basis of existing law, a state judge was motivated by antipathy to the Constitution, bias against the defendant, political considerations, or simply egregiously poor judgment. Moreover, Teague's "reasonableness" test has proved difficult to apply. Reaching conflicting conclusions on the same facts are, e.g., Zettlemoyer v. Fulcomer, 923 F.2d 284, 306 n.19 (3d Cir.), cert. denied, 111 S. Ct. 2840 (1991), and

(Footnote continued)

(Footnote 57 continued from previous page)
McDougall v. Dixon, 921 F.2d 518, 539 (4th Cir. 1990); Graham v. Hoke, 946 F.2d 982, 992-94 (2d Cir. 1991), cert. denied, 112 S. Ct. 890 (1992), and Hanrahan v. Greer, 896 F.2d 241, 245 (7th Cir. 1990); Cain v. Redman, 947 F.2d 817, 821-22 (6th Cir. 1991), and Acosta v. Makowski, 756 F. Supp. 1018, 1021 (E.D. Mich. 1991).

[58] See Monaghan, supra note 45, at 234-35 ("the categories of law and fact have traditionally served an important regulatory function in distributing authority among various decisionmakers in the legal system" and find expression in Article III and the Seventh Amendment to the Constitution).

efficiency and comity problems as it supposedly addresses.

IV. Conclusion

For the reasons stated herein, the Court should decline to adopt a rule that federal habeas courts give deference to state court conclusions of law on federal constitutional claims. Instead, the Court should continue to enforce the time-honored and congressionally adopted standard of *de novo* review.

Respectfully submitted,

James S. Liebman
Columbia University
School of Law
435 West 116th St.
Box B-16
New York, N.Y. 10027

Douglas G. Robinson*
Julia E. Sullivan
1440 New York Ave., N.W.
Washington, D.C. 20005
(202) 371-7000

Counsel for Amici Curiae

*Counsel of Record

APPENDIX

APPENDIX A
HABEAS "GRANT" RATES, ALL CASES

TABLE I: RATE OF RELIEF GRANTED IN STATE-PRISONER HABEAS PETITIONS 1963-1981[1]

Year	Jurisdiction	%Granted
1963	All	2.5
1964	All	3.9
1965	All	3.7
1970	All	4.0
1970	Massachusetts	4.0
1971	Massachusetts	1.0
1972	Massachusetts	4.0
1973-75	SDNY	3.0
1975-77	CA7, CDCA, SDCA, NDIl., DNJ, EDVa.	3.2
1979-81	SDNY	4.0

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[1] SOURCES: S. Rep. No. 1797, 89th Cong., 2d Sess. 4-5 (1966) (mid-1960s data); Wright & Sofaer, Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility, 75 Yale L.J. 895 (1966) (1963, 1964, 1965 data); Ann. Report of the Administrative Office of the United States Courts 132 (1971) (1970 data); Shapiro, Federal Habeas Corpus: A Study in Massachusetts, 87 Harv. L. Rev. 321, 333 (1973) (Massachusetts data, 1970-72); U.S. Department of Justice, An Empirical Study of Federal Habeas Corpus Review of State Court Judgments 5, 51, table 19 (1979) (1975-77 data); Faust, Rubenstein & Yackle, The Great Writ in Action: Empirical Light on the Federal Habeas Corpus Debate, 18 N.Y.U. J.L. & Soc. Change 637, 681 (1990-91) (1973-75 and 1979-81 data).

APPENDIX B
HABEAS "GRANT" RATES, CAPITAL CASES

TABLE I:
RATE OF REVERSIBLE CONSTITUTIONAL ERROR FOUND UPON FINAL HABEAS REVIEW OF STATE CAPITAL JUDGMENTS 1976-1991[1]

Period	Judgments Reviewed	Const'l Violations Found	Violation Rate
7/1/76-5/31/91	149	357	42%[2]

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[1] Published federal decisions document the final outcomes of capitally sentenced petitioners' habeas corpus challenges to 357 state-court capital judgments between July 1, 1976 and May 31, 1991. (Table VI infra lists the decisions.) A "final outcome" is the result after all legally permissible federal habeas challenges to a state judgment have been finally resolved on the merits by the federal courts. Using sources other than published federal opinions, 47 additional outcomes were documented -- 42 grants of habeas relief and 5 denials, for a documented total of 191 reversible constitutional violations affecting 404 judgments (47% violation rate). See Appendix to Statement of John J. Cutin, Jr. before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, July 17, 1991 (preliminary analysis of same data, including unpublished decisions).

[2] Constitutional violations were found in 147 first-petition cases and 2 successive-petition cases.

TABLE II

ANNUAL CONSTITUTIONAL-VIOLATION RATES IN FIRST-PETITION CAPITAL HABEAS CASES JULY 1976-MAY 1991

1978	50%	(1/2)	1985	41%	(15/37)
1979	--	(0/0)	1986	43%	(19/44)
1980	75%	(3/4)	1987	50%	(18/36)
1981	67%	(6/9)	1988	42%	(22/52)
1982	80%	(12/15)	1989	28%	(10/36)
1983	29%	(9/31)	1990	28%	(9/32)
1984	29%	(11/38)	1991	53%	(12/21)
'78-84	**42%**	**(42/99)**	**'85-91**	**41%**	**(105/258)**

TOTAL '78-91 41% (147/357)

TABLE III

CONSTITUTIONAL-VIOLATION RATES IN FIRST-PETITION CAPITAL HABEAS CASES BY CIRCUIT JULY 1976-MAY 1991[3]

3rd	50%	(1/2)	8th	46%	(13/28)
4th	13%	(4/30)	9th	69%	(9/13)
5th	30%	(36/121)	10th	60%	(6/10)
6th	100%	(1/1)	11th	49%	(72/146)
7th	83%	(5/6)	**All**	**41%**	**(147/357)**

---

[3] Fifth Circuit data include cases adjudicated by both the old Fifth Circuit (AL, FL, GA, LA, MS, TX) and the new Fifth Circuit (LA, MS, TX).

TABLE IV

BASES FOR CONSTITUTIONAL RELIEF:
HABEAS GRANTS IN GEORGIA CASES
JULY 1976-MAY 1991

Type of violation	Cases Involving Est'd Fact/Law		All Cases	
Improper b/prf instr.	10	(26%)	10	(19%)
Jury composition	6	(15%)	7	(13%)
Prosec. misconduct	6	(15%)	6	(11%)
Other improper instr.	5	(13%)	5	(9%)
Ineffective assist.	4	(10%)	13	(25%)
Prejudicial public'y	1	(3%)	4	(8%)
Incompet. to std tr.	1	(3%)	2	(4%)
Involun. confession	1	(3%)	1	(2%)
Requested attny den'd	1	(0%)	1	(2%)
Miranda	1	(3%)	1	(2%)
Estelle v. Smith	1	(3%)	1	(2%)
Denial confrontation	1	(3%)	1	(2%)
Mitig'g ev. excluded	1	(3%)	1	(2%)
TOTAL	**39**		**53**	

Explanation: The federal opinions in which the 46 state capital judgments originating in Georgia were finally reviewed by federal habeas courts between 1976 and 1991 and found to be flawed by reversible constitutional error were analyzed to see how many of the violation findings turned on the federal courts' application of the same law and facts as the state courts applied when they upheld the judgment. By excluding cases in which

federal hearings were held and "new law" applied, 32 such cases were identified.[4] The federal decisions in those cases were reviewed to determine how many included language or findings indicative of bad faith or unreasonable judging by the state courts that previously had rejected the claims. No such decisions were found. Table IV above lists the constitutional claims on which relief was granted in (1) the 32 cases involving the federal courts' application of the same law and facts as the state courts applied, and (2) in all 46 cases. Total claims exceed the total number of cases because federal relief was granted on multiple grounds in several cases.

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[4] The petitioners in the 32 cases are: Alderman, Berryhill-A, Berryhill-B, Bowen, Brooks, Buttrum, Cervi, Corn, Cunningham, Davis, Dick, Dix, Drake, Fair, Finney, Franklin, Gibson, Godfrey, Goodwin, Hance, Machetti, Mason, Moore, Morgan, Potts-A, Potts-B, Ruffin, Strickland, Thomas (Joseph), Wallace, Wilson, Young.

TABLE V

ANNUAL CONSTITUTIONAL-VIOLATION RATES IN FIRST-PETITION CAPITAL HABEAS CASES BY STATES -- 5TH, 11TH CIRCUITS JULY 1976-MAY 1991

Fifth Circuit[5]

Year	Grants/ Petn	(%)	Grants/ Petn	(%)	Grants/ Petn	(%)
	LOUISIANA		**MISSISSIP.**		**TEXAS**	
80	0/0	--	0/0	--	2/2	(100)
81	0/1	(0)	1/1	(100)	3/3	(100)
82	1/2	(50)	2/3	(67)	3/4	(75)
83	0/2	(0)	0/0	--	2/8	(25)
84	1/7	(14)	0/0	--	1/3	(33)
85	1/5	(20)	0/0	--	2/3	(67)
86	2/6	(33)	5/6	(83)	0/8	(0)
87	0/2	(0)	0/1	(0)	0/5	(0)
88	0/4	(0)	0/2	(0)	1/1	(9)
89	1/2	(50)	0/0	(0)	1/1	(10)
90	0/1	(0)	0/2	(0)	1/4	(25)
91	0/0	--	0/0	--	1/1	(100)
TOT.	**6/32**	**(19)**	**8/15**	**(53)**	**17/62**	**(27)**

[5] Table excludes cases adjudicated by the old Fifth Circuit that arose in States now included in the Eleventh Circuit.

Eleventh Circuit[6]

Year	Grants/ Petn	(%)	Grants/ Petn	(%)	Grants/ Petn	(%)
	ALABAMA		**FLORIDA**		**GEORGIA**	
78	0/0	--	0/1	(0)	0/0	--
80	0/1	(0)	1/1	(100)	0/0	--
81	0/0	--	0/1	(0)	2/3	(67)
82	0/0	--	1/1	(100)	5/5	(100)
83	0/0	--	0/8	(0)	5/9	(56)
84	0/0	--	2/9	(22)	5/12	(42)
85	0/1	(0)	0/9	(0)	11/15	(73)
86	1/1	(100)	2/6	(33)	3/6	(50)
87	0/2	(0)	8/12	(67)	6/7	(86)
88	0/3	(0)	7/9	(78)	6/8	(75)
89	0/2	(0)	2/8	(25)	1/2	(50)
90	0/0	--	1/2	(50)	1/2	(50)
91	1/1	(100)	5/10	(50)	1/1	(100)
TOT.	**2/11**	**(18)**	**29/77**	**(38)**	**46/70**	**(66)**

[6] Table includes cases adjudicated by the old Fifth Circuit before it was split into the Fifth and Eleventh Circuits.

TABLE VI

STATE CAPITAL JUDGMENTS FINALLY REVIEWED ON HABEAS CORPUS, JULY 1976-MAY 1991[7]

Name State
Yr P R Ct Vol Rptr Page

ADAMS, A. FL
85 1 - 11 764 F.2d 1356

ADAMS, J. FL
83 1 - 11 709 F.2d 1443

ADAMSON AZ
88 1 + 09 865 F.2d 1011

ALDERMAN GA
81 1 + 05 663 F.2d 0558

ALDRICH FL
85 1 - 11 777 F.2d 0630

ALDRIDGE FL
91 1 + 11 925 F.2d 1320

ALVORD FL
84 1 - 11 725 F.2d 1282

AMADEO GA
88 1 + 11 486 U.S. 0214

ANDRADE TX
86 1 - 05 805 F.2d 1190

ANTONE FL
83 1 - 11 706 F.2d 1534

ARMSTRONG FL
87 1 + 11 833 F.2d 1430

AUTRY TX
83 1 - 05 706 F.2d 1394

BALDWIN LA
81 1 - 05 653 F.2d 0942

BAREFOOT TX
83 1 - 05 463 U.S. 0880

BARFIELD NC
83 1 - 04 719 F.2d 0058

BASS TX
83 1 - 05 696 F.2d 1154

BASSETTE VA
90 1 - 04 915 F.2d 0932

BATTIE TX
81 1 + 05 655 F.2d 0692

BELL MS
82 1 + 05 692 F.2d 0999

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[7] In addition to the name of the petitioner whose capital judgment was reviewed, the table includes the year of the decision (Yr); the number of each petition filed (P); the result (R) ("+" indicates that a reversible constitutional violation was found; "-" indicates that no violation was found); the convicting State; and the citation of the decision finally adjudicating petitioners' initial habeas petitions and of the two decisions granting relief on successive petitions. Citations followed by an asterisk refer to published decisions documenting previously unpublished outcomes.

BELL-A TX
84 1 + 05 828 F.2d 1088*

BELL-B TX
87 1 - 05 828 F.2d 1085

BERRY LA
85 1 - 05 765 F.2d 0451

BERRYHILL-A GA
81 1 + 05 640 F.2d 0382

BERRYHILL-B GA
88 1 + 11 858 F.2d 0633

BERTOLOTTI FL
89 1 - 11 883 F.2d 1503

BLAIR MO
90 1 - 08 916 F.2d 1310

BLAKE GA
85 1 + 11 758 F.2d 0523

BOGGS VA
84 1 - 04 892 F.2d 1193

BOLDER MO
90 1 - 08 921 F.2d 1359

BOOKER FL
81 1 - 05 703 F.2d 1251
91 3 + 11 922 F.2d 0633

BOWDEN GA
84 1 - 11 767 F.2d 0761

BOWEN, Charles GA
87 1 + 11 832 F.2d 0546

BOWEN, Clifford OK
86 1 + 10 799 F.2d 0593

BREWER IN
90 1 + 07 917 F.2d 1306

BRIDGE TX
88 1 - 05 860 F.2d 0162

BRILEY, J. VA
85 1 - 04 750 F.2d 1238

BRILEY, L. VA
84 1 - 04 742 F.2d 0155

BROCK TX
86 1 - 05 781 F.2d 1152

BROGDON LA
86 1 - 05 790 F.2d 1164

BROOKS, C. TX
82 1 - 05 702 F.2d 0084

BROOKS, W. GA
87 1 + 11 809 F.2d 0700

BROWN, D. NC
89 1 - 04 891 F.2d 0490

BROWN, J. FL
86 1 + 11 785 F.2d 1457

BUFORD FL
88 1 + 11 841 F.2d 1057

BULLOCK MS
86 1 + 05 784 F.2d 0187

BUNDY FL
88 1 - 11 850 F.2d 1402

BURGER GA
86 1 - 11 785 F.2d 0890

BURNS TX
80 1 + 05 626 F.2d 0396

BUTLER SC
90 1 - 04 110 S.Ct 1212

BUTTRUM GA
90 1 + 11 908 F.2d 0695

BUXTON TX
89 1 - 05 879 F.2d 0140

BYRNE LA
88 1 - 05 847 F.2d 1130

CAMPBELL WA
87 1 - 09 829 F.2d 1453

CAPE GA
84 1 - 11 741 F.2d 1287

CARTWRIGHT OK
88 1 + 10 486 U.S. 0356

CELESTINE LA
84 1 - 05 750 F.2d 0353

CERVI GA
88 1 + 11 855 F.2d 0702

CHAMBERS MO
90 1 + 08 907 F.2d 0825

CHANEY OK
84 1 + 10 730 F.2d 1334

CHRISTOPHER FL
87 1 + 11 824 F.2d 0836

CLANTON VA
87 1 - 04 826 F.2d 1354

CLARK, C. LA
82 1 + 05 694 F.2d 0075

CLARK, R. FL
87 1 - 11 834 F.2d 1561

CLOZZA VA
90 1 - 04 913 F.2d 1092

COLEMAN, C. OK
86 1 - 10 802 F.2d 1227

COLEMAN, D. MT
89 1 + 09 874 F.2d 1280

COLEMAN, W. GA
85 1 + 11 778 F.2d 1487

COLLINS, C. AR
85 1 + 08 754 F.2d 0258

COLLINS, R. GA
84 1 - 11 728 F.2d 1322

CORDOVA TX
88 1 + 05 838 F.2d 0764

CORN GA
88 1 + 11 837 F.2d 1474

CREECH ID
91 1 + 09 928 F.2d 1481

CUEVAS TX
90 1 - 05 922 F.2d 0242

CUNNINGHAM GA
91 1 + 11 928 F.2d 1006

DARDEN FL
83 1 - 11 767 F.2d 0752

DAVIS, CHARLES OK
90 1 + 10 911 F.2d 0415

DAVIS, CURFEW GA
85 1 + 11 752 F.2d 1515

DAVIS, F. FL
87 1 - 11 829 F.2d 1522

DE LA ROSA TX
84 1 - 05 743 F.2d 0299

DELAP FL
89 1 + 11 890 F.2d 0285

DELUNA TX
89 1 - 05 873 F.2d 0757

DEMPS FL
86 1 - 11 805 F.2d 1426

DENTON-A AR
86 1 + 08 806 F.2d 0158

DICK GA
87 1 + 11 833 F.2d 1448

DILLON IN
84 1 + 07 751 F.2d 0895

DIX GA
87 1 + 11 832 F.2d 0546

DOBBERT
83 1 - 11 718 F.2d 1518

DOUGLAS FL
84 1 + 11 739 F.2d 0531

DOYLE FL
91 1 - 11 922 F.2d 0646

DRAKE GA
85 1 + 11 762 F.2d 1449

DUNGEE GA
85 1 + 11 778 F.2d 1482

DUNKINS AL
88 1 - 11 854 F.2d 0394

DUTTON OK
87 1 + 10 812 F.2d 0593

EARVIN TX
88 1 - 05 860 F.2d 0623

EDWARDS MS
88 1 - 05 849 F.2d 0204

ELLEDGE FL
87 1 + 11 823 F.2d 1439

ELLIS TX
89 1 - 05 873 F.2d 0830

ESQUIVEL TX
85 1 - 05 777 F.2d 0956

EVANS, C. MS
87 1 - 05 809 F.2d 0239

EVANS, J. AL
80 1 - 05 628 F.2d 0400

EVANS, L. AZ
88 1 + 09 855 F.2d 0631

EVANS, M. TX
86 1 - 05 790 F.2d 1232

EVANS, W. VA
89 1 - 04 881 F.2d 0117

FAIR GA
83 1 + 11 715 F.2d 1519

FELDE LA
87 1 - 05 817 F.2d 0281

FELDER TX
85 1 + 05 765 F.2d 1245

FIERRO TX
89 1 - 05 879 F.2d 1276

FINNEY GA
83 1 + 11 709 F.2d 0643

FITZPATRICK MT
89 1 + 09 869 F.2d 1247

FLEMMING GA
84 1 - 11 748 F.2d 1435

FLOWERS LA
86 1 + 05 779 F.2d 1115

FOSTER FL
83 1 - 11 707 F.2d 1337

FRANCIS FL
90 1 - 11 908 F.2d 0696

FRANCOIS FL
84 1 - 11 741 F.2d 1275

FRANKLIN, D. TX
88 1 - 05 487 U.S. 0164

FRANKLIN, R. GA
85 1 + 11 471 U.S. 0307

FUNCHESS FL
85 1 - 11 772 F.2d 0683

GAINES IL
88 1 + 07 846 F.2d 0402

GARRETT TX
88 1 - 05 842 F.2d 0113

GASKINS SC
90 1 - 04 916 F.2d 0941

GATES GA
89 1 - 11 863 F.2d 1492

GHOLSON TX
82 1 + 05 675 F.2d 0734

GIARRATANO VA
89 1 - 04 891 F.2d 0483

GIBSON GA
83 1 + 11 705 F.2d 1543

GILLIARD MS
88 1 - 05 847 F.2d 1141

GILMORE MO
88 1 - 08 861 F.2d 1061

GLASS LA
86 1 - 05 791 F.2d 1165

GODFREY GA
88 1 + 11 836 F.2d 1557

GOODE FL
84 1 - 11 725 F.2d 0106

GOODWIN GA
82 1 + 11 684 F.2d 0794

GORE FL
91 1 + 11 933 F.2d 0904

GRANVIEL-A TX
81 1 + 05 655 F.2d 0673

GRANVIEL-B TX
89 1 - 05 881 F.2d 0185

GRAY MS
82 1 - 05 677 F.2d 1086

GREEN, RANDY TX
83 1 + 05 706 F.2d 0148

GREEN, ROOSEVELT GA
84 1 - 11 738 F.2d 1529

GRIFFIN, J. TX
87 1 - 05 823 F.2d 0856

GRIFFIN, K. FL
89 1 - 11 874 F.2d 1397

GUINAN MO
90 1 - 08 909 F.2d 1224

HALL FL
86 1 - 11 805 F.2d 0945

HAMBLEN FL
89 1 - 11 492 U.S. 0929

HANCE GA
83 1 + 11 696 F.2d 0940

HARDING AZ
87 1 - 09 834 F.2d 0853

HARGRAVE FL
87 1 + 11 832 F.2d 1528

HARICH FL
88 1 - 11 844 F.2d 1464

HARPER NE
90 1 - 08 895 F.2d 0473

HARRIS FL
89 1 + 11 874 F.2d 0756

HAWKINS TX
88 1 - 05 844 F.2d 1132

HAYES AR
89 1 + 08 881 F.2d 1451

HENDERSON, R. FL
91 1 - 11 925 F.2d 1309

HENDERSON, W. AR
91 1 + 08 926 F.2d 0706

HENRY FL
83 1 - 05 721 F.2d 0990

HERRERA TX
90 1 - 05 904 F.2d 0944

HIGH GA
90 1 - 11 916 F.2d 1507

HILL, A. MS
90 1 - 05 920 F.2d 0249

HILL, S. AR
91 1 - 08 927 F.2d 0340

HITCHCOCK FL
87 1 + 11 832 F.2d 0140

HOLTAN-A NE
83 1 + 08 683 F.2d 1163

HOLTAN-B NE
88 1 + 08 838 F.2d 0984

HOPKINSON WY
89 1 - 10 888 F.2d 1286

HOUSE GA
84 1 + 11 725 F.2d 0608

HUTCHINS NC
83 1 - 04 724 F.2d 1425

HYMAN SC
87 1 + 04 824 F.2d 1405

ISAACS GA
85 1 + 11 778 F.2d 1482

JACKSON, C. FL
91 1 + 11 931 F.2d 0712

JACKSON, R. FL
88 1 + 11 837 F.2d 1469

JAMES LA
87 1 - 05 827 F.2d 1006

JOHNSON, EDWARD MS
86 1 - 05 806 F.2d 1243

JOHNSON, ELLIOTT TX
86 1 - 05 804 F.2d 0300

JOHNSON, J. GA
86 1 + 11 781 F.2d 1482

JOHNSON, L. FL
85 1 - 11 778 F.2d 0623

JONES, ANDREW LA
88 1 - 05 864 F.2d 0348

JONES, ARTHUR AL
85 1 - 11 772 F.2d 0668

JONES, LARRY MS
86 1 + 05 788 F.2d 1101

JONES, LEO FL
91 1 - 11 928 F.2d 1020

JONES, R. MS
82 1 + 05 681 F.2d 1067

JULIUS AL
88 1 - 11 840 F.2d 1533

JUREK TX
80 1 + 05 623 F.2d 0929

JUSTUS VA
90 1 - 04 897 F.2d 0709

KELLY TX
88 1 - 05 862 F.2d 1126

KENLEY MO
91 1 + 08 937 F.2d 1298

KENNEDY FL
91 1 - 11 933 F.2d 0905

KING, A. FL
84 1 + 11 748 F.2d 1462

KING, L. TX
88 1 - 05 850 F.2d 1055

KIRKPATRICK LA
89 1 - 05 870 F.2d 0276

KNIGHT FL
88 1 + 11 863 F.2d 0705

KNIGHTON LA
84 1 - 05 740 F.2d 1344

KNOX TX
91 1 + 05 928 F.2d 0657

KORDENBROCK KY
90 1 + 06 919 F.2d 1091

KUBAT IL
89 1 + 07 867 F.2d 0351

LANDRY TX
88 1 - 05 844 F.2d 1117

LAWS MO
88 1 - 08 863 F.2d 1377

LESKO PA
91 1 + 03 925 F.2d 1527

LEWIS IL
87 1 + 07 832 F.2d 1446

LIGHTBORNE FL
87 1 - 11 829 F.2d 1012

LINDSEY, M. AL
87 1 - 11 820 F.2d 1137

LINDSEY, T. LA
85 1 + 05 769 F.2d 1034

LOWENFIELD LA
88 1 - 05 484 U.S. 0231

MACHETTI GA
82 1 + 11 679 F.2d 0236

MAGILL FL
87 1 + 11 824 F.2d 0879

MAGWOOD AL
86 1 + 11 791 F.2d 1438

MANN, F. TX
88 1 - 05 840 F.2d 1194

MANN, L. FL
88 1 + 11 844 F.2d 1446

MARTIN, D. LA
83 1 - 05 711 F.2d 1273

MARTIN, N. FL
85 1 - 11 770 F.2d 0918

MASON, G. GA
82 1 + 05 669 F.2d 0222

MASON, M. VA
84 1 - 04 748 F.2d 0852

MATTHESON LA
85 1 - 05 751 F.2d 1432

MAY TX
90 1 - 05 904 F.2d 0228

MAYO TX
90 1 + 05 893 F.2d 0683

MCCLESKEY GA
87 1 - 11 481 U.S. 0279

MCCORQUODALE GA
83 1 - 11 721 F.2d 1493

MCCOY TX
89 1 - 05 874 F.2d 0954

MCDOUGALL NC
90 1 - 04 921 F.2d 0518

MCDOWELL NC
88 1 + 04 858 F.2d 0945

MERCER MO
88 1 - 08 844 F.2d 0582

MESSER, C. FL
87 1 + 11 834 F.2d 0890

MESSER, J. GA
85 1 - 11 760 F.2d 1080

MIDDLETON FL
88 1 + 11 849 F.2d 0491

MILTON TX
84 1 - 05 744 F.2d 1091

MITCHELL GA
85 1 - 11 762 F.2d 0886

MONROE-A LA
84 1 + 05 748 F.2d 0958

MONROE-B LA
88 1 - 05 883 F.2d 0331

MOORE, A. LA
84 1 - 05 740 F.2d 0308

MOORE, CAREY NE
90 1 + 08 904 F.2d 1226

MOORE, CARZELL GA
87 1 + 11 809 F.2d 0702

MOORE, M. TX
82 1 + 05 670 F.2d 0056

MOORE, W. GA
83 1 - 11 716 F.2d 1511

MORGAN GA
84 1 + 11 743 F.2d 0775

MULLIGAN GA
85 1 - 11 771 F.2d 1436

MUNIZ TX
85 1 + 05 760 F.2d 0588

NEVIUS NV
88 1 - 09 852 F.2d 0463

NEWLON MO
89 1 + 08 885 F.2d 1328

O'BRYAN TX
83 1 - 05 714 F.2d 0365

OSBORNE WY
88 1 + 10 861 F.2d 0612

OTEY NE
88 1 - 08 859 F.2d 0575

PALMES FL
84 1 - 11 725 F.2d 1511

PARKER FL
91 1 + 11 111 S.Ct 0731

PARKS OK
90 1 - 10 110 S.Ct 1257

PASTER TX
89 1 - 05 876 F.2d 1184

PEEK GA
86 1 - 11 784 F.2d 1479

PENRY TX
89 1 + 05 492 U.S. 0302

PERRY AR
89 1 - 08 871 F.2d 1384

PETERSON VA
90 1 - 04 904 F.2d 0882

PICKENS AR
83 1 + 08 714 F.2d 1455

PIERRE-SELBY UT
86 1 - 10 802 F.2d 1282

PORTER TX
83 1 - 05 709 F.2d 0944

POTTS-A GA
84 1 + 11 734 F.2d 0526

POTTS-B GA
87 1 + 11 814 F.2d 1512

PREJEAN LA
84 1 - 05 743 F.2d 1091

PROFFITT FL
82 1 + 11 685 F.2d 1227

PRUETT MS
86 1 + 05 805 F.2d 1032

RAULERSON-A FL
80 1 + 05 732 F.2d 0805*

RAULERSON-B FL
84 1 - 11 732 F.2d 0803

RAULT LA
85 1 - 05 772 F.2d 0117

RECTOR AR
91 1 - 08 923 F.2d 0570

REDDIX MS
86 1 + 05 805 F.2d 0506

RICHARDSON AL
89 1 - 11 864 F.2d 1536

RICHMOND-A AZ
78 1 + 09 921 F.2d 0937*

RICHMOND-B AZ
90 1 - 09 921 F.2d 0933

RILES TX
86 1 - 05 799 F.2d 0947

RILEY FL
85 1 - 11 778 F.2d 1544

RINGSTAFF FL
89 1 - 11 885 F.2d 1542

RITTER AL
87 1 - 11 811 F.2d 1398

ROACH SC
85 1 - 04 757 F.2d 1463

ROMERO TX
89 1 - 05 884 F.2d 0871

ROOK NC
86 1 - 04 783 F.2d 0401

ROSS TX
82 1 + 05 675 F.2d 0734

RUFFIN, J. GA
85 1 + 11 767 F.2d 0748

RUFFIN, M. FL
88 1 + 11 848 F.2d 1512

RUIZ-A AR
86 1 + 08 806 F.2d 0158

RUSHING LA
89 1 + 05 868 F.2d 0800

RUSSELL TX
89 1 - 05 892 F.2d 1205

SAWYER LA
90 1 - 05 110 S.Ct 2822

SCOTT FL
89 1 - 11 891 F.2d 0800

SHAW SC
84 1 - 04 733 F.2d 0304

SHRINER FL
83 1 - 11 715 F.2d 1452

SHUMAN NV
87 1 + 09 483 U.S. 0066

SILAGY IL
90 1 - 07 905 F.2d 0986

SIMMONS AR
90 1 - 08 915 F.2d 0372

SINGLETON AL
88 1 - 11 847 F.2d 0668

SKILLERN TX
83 1 - 05 720 F.2d 0839

SMITH, D. FL
86 1 + 11 799 F.2d 1442

SMITH, ELWOOD NC
91 1 - 04 931 F.2d 0242

SMITH, ERNEST TX
81 1 + 05 451 U.S. 0454

SMITH, G. MO
89 1 - 08 888 F.2d 0530

SMITH, JIMMY FL
90 1 + 11 911 F.2d 0494

SMITH, JOHN GA
81 1 - 05 660 F.2d 0573

SMITH, L. TX
86 1 - 05 451 U.S. 0454

SMITH, M. VA
86 1 - 04 477 U.S. 0527

SMITH, R. MT
90 1 + 09 914 F.2d 1153

SMITH, WILLIAM GA
89 1 + 11 887 F.2d 1407

SMITH, WILLIE MS
90 1 - 05 904 F.2d 0950

SOLOMON GA
84 1 - 11 735 F.2d 0395

SONGER FL
84 1 - 11 733 F.2d 0788
85 2 + 11 769 F.2d 1488

SONNIER LA
83 1 - 05 720 F.2d 0401

SPENKELLINK FL
78 1 - 05 578 F.2d 0582

SPIVEY GA
82 1 + 05 683 F.2d 0881

SPRAGGINS GA
83 1 + 11 720 F.2d 1190

STAMPER VA
84 1 - 04 724 F.2d 1106

STANLEY GA
83 1 - 11 697 F.2d 0955

STANO FL
91 1 - 11 921 F.2d 1125

STEPHENS, A. GA
83 1 - 05 716 F.2d 0276

STEPHENS, W. GA
88 1 + 11 846 F.2d 0642

STEWART FL
89 1 - 11 877 F.2d 0851

STOCKTON VA
88 1 + 04 852 F.2d 0740

STOKES MO
88 1 - 08 851 F.2d 1085

STONE FL
88 1 + 11 837 F.2d 1477

STRAIGHT FL
85 1 - 11 772 F.2d 0674

STREETMAN TX
88 1 - 05 835 F.2d 1519

STRICKLAND GA
84 1 + 11 738 F.2d 1542

SULLIVAN FL
83 1 - 11 695 F.2d 1306

SUMMIT LA
86 1 + 05 795 F.2d 1237

TAFERO FL
86 1 - 11 796 F.2d 1314

TAYLOR LA
84 1 - 05 727 F.2d 0341

THIGPEN AL
91 1 + 11 926 F.2d 1003

THOMAS, DANIEL AL
89 1 - 11 891 F.2d 1500

THOMAS, DANIEL FL
85 1 - 11 767 F.2d 0738

THOMAS, DONALD GA
86 1 + 11 796 F.2d 1322

THOMAS, J. GA
86 1 + 11 800 F.2d 1024

THOMPSON, J. TX
87 1 - 05 821 F.2d 1054

THOMPSON, W. FL
86 1 - 11 787 F.2d 1447

TROEDEL FL
87 1 + 11 828 F.2d 0670

TUCKER, R. GA
85 1 - 11 776 F.2d 1487

TUCKER, W. GA
86 1 - 11 802 F.2d 1293

TURNER VA
86 1 + 04 476 U.S. 0028

TYLER GA
85 1 + 11 755 F.2d 0741

VICKERS AZ
86 1 + 09 798 F.2d 0369

WALLACE GA
85 1 + 11 757 F.2d 1102

WASHINGTON, D. FL
84 1 - 05 737 F.2d 0894

WASHINGTON, J. MS
81 1 + 05 655 F.2d 1346

WATSON LA
85 1 - 05 756 F.2d 1055

WAYE VA
89 1 - 04 884 F.2d 0762

WELCOME LA
86 1 - 05 793 F.2d 0672

WESTBROOK GA
84 1 + 11 743 F.2d 0764

WHEAT MS
86 1 + 05 793 F.2d 0621

WHITE, B. FL
87 1 - 11 809 F.2d 1478

WHITE, L. TX
83 1 + 05 720 F.2d 0415

WHITLEY VA
86 1 - 04 802 F.2d 1487

WICKER TX
86 1 - 05 783 F.2d 0487

WILLIAMS, A. TX
87 1 - 05 809 F.2d 1063

WILLIAMS, C. TX
87 1 - 05 826 F.2d 0011

WILLIAMS, D. MO
85 1 - 08 763 F.2d 1363

WILLIAMS, H. GA
88 1 - 11 846 F.2d 1276

WILLIAMS, R. LA
82 1 - 05 679 F.2d 0381

WILLIE LA
84 1 - 05 737 F.2d 1372

WILLIS GA
88 1 - 11 838 F.2d 1510

WILSON GA
85 1 + 11 777 F.2d 0621

WINGO LA
86 1 - 05 786 F.2d 0654

WITT FL
85 1 - 11 469 U.S. 0412

WOODARD AR
86 1 + 08 806 F.2d 0153

WOODS FL
91 1 + 11 923 F.2d 1454

WOOLLS TX
86 1 - 05 798 F.2d 0695

WOOMER SC
88 1 - 04 856 F.2d 0677

YOUNG, C. GA
82 1 + 11 677 F.2d 0792

YOUNG, J. GA
84 1 - 11 727 F.2d 1489

ZETTLEMOYER PA
91 1 - 03 923 F.2d 0284

APPENDIX C

ANALYSIS OF PUBLISHED FEDERAL CIRCUIT OPINIONS IN NONCAPITAL HABEAS CASES, VARIOUS YEARS, STATES AND CIRCUITS[1]

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[1] An explanation of Tables I and II follows Table II.

TABLE I

GRANTS IN ALL PUBLISHED HABEAS CASES AND IN PUBLISHED HABEAS CASES NOT INVOLVING NEW LAW, NEW FACTS, OR EVIDENCE OF UNREASONABLENESS ALL STATES, 1988-89

	Total Decisions	Merits Decisions	Total Grants	Grants New Law or Fact	Total Grants/ 1000 Petns Filed
ALL STATES	442	359	75	8	3.71
ALABAMA	25	22	4	0	4.25
ALASKA	3	3	1	0	18.18
ARIZONA	8	7	0	0	N/A
ARKANSAS	36	31	5	3	13.05
CALIFORNIA	13	8	2	0	N/A
COLORADO	2	1	0	0	0.00
CONNECTICUT	5	5	1	0	7.94
DELAWARE	1	0	0	0	0.00
FLORIDA	35	30	3	0	2.28
GEORGIA	15	9	2	0	3.25
HAWAII	2	1	0	0	0.00

	Total Decisions	Merits Decisions	Total Grants	Grants New Law or Fact	Total Grants/ 1000 Petns Filed
IDAHO	2	1	0	0	0.00
ILLINOIS	27	25	5	2	10.33
INDIANA	12	10	2	0	4.12
IOWA	8	8	0	0	0.00
KANSAS	2	1	1	0	7.46
KENTUCKY	16	15	7	1	14.89
LOUISIANA	25	23	5	0	6.40
MAINE	2	2	0	0	0.00
MARYLAND	3	2	0	0	0.00
MASSACHUSETTS	10	8	2	0	14.18
MICHIGAN	9	6	2	0	2.71
MINNESOTA	4	4	0	0	0.00
MISSISSIPPI	5	5	1	0	4.02
MISSOURI	19	16	1	0	1.30
MONTANA	3	2	1	0	13.16
NEBRASKA	8	7	2	1	17.09
NEVADA	4	2	0	0	0.00
NEW HAMPSHIRE	1	1	1	0	23.81
NEW JERSEY	6	6	4	0	8.73
NEW MEXICO	10	10	3	0	19.74
NEW YORK	30	19	3	0	2.15

	Total Decisions	Merits Decisions	Total Grants	Grants New Law or Fact	Total Grants/ 1000 Petns Filed
NORTH CAROLINA	1	1	0	0	0.00
NORTH DAKOTA	1	1	0	0	0.00
OHIO	12	10	3	0	4.62
OKLAHOMA	1	1	0	0	0.00
OREGON	1	1	1	0	5.03
PENNSYLVANIA	10	4	1	0	0.91
RHODE ISLAND	0	0	0	0	0.00
SOUTH CAROLINA	2	1	0	0	0.00
SOUTH DAKOTA	2	2	1	0	26.32
TENNESSEE	6	6	1	0	2.08
TEXAS	25	18	7	1	4.36
UTAH	0	0	0	0	0.00
VERMONT	0	0	0	0	0.00
VIRGINIA	4	4	0	0	0.00
WASHINGTON	14	10	3	0	7.71
WEST VIRGINIA	0	0	0	0	0.00
WISCONSIN	12	10	0	0	0.00
WYOMING	0	0	0	0	0.00

TABLE II

BETWEEN-STATE DISPARITIES IN HABEAS "GRANT" RATES WITHIN CIRCUITS IN PUBLISHED CIRCUIT OPINIONS 5TH, 6TH, 7TH CIRCUITS, 1987-90

State	Total Grants/ Merits Decns-#	Total Grants/ Merits Decns-%	Total Grants/ 1000 Petns Filed
CA6	**20/67**	**30%**	**4.36**
KY	9/24	38%	10.73
OH	6/16	38%	4.41
MI	4/16	25%	2.91
TN	1/11	9%	.99
CA7	**20/112**	**18%**	**8.34**
IL	15/67	22%	14.22
IN	4/22	18%	4.46
WI	1/23	4%	2.24
CA5	**21/95**	**22%**	**4.09**
TX	12/38	32%	3.80
MS	3/14	21%	6.09
LA	6/43	14%	4.04

Explanation of Tables I and II: The data presented in this Appendix were derived from all published state-prisoner habeas corpus decisions in noncapital cases in the Federal Second Reporter volumes covering the years 1988 and 1989 (vols. 838-889). To expand the pool of cases for more refined study in selected circuits, all published habeas decisions in the 5th, 6th, and 7th Circuits in the Federal Second Reporter volumes covering the years 1987 and 1990 (vols. 810-37, 890-922) also were analyzed. Arranging the data by convicting State, Table I reports: (1) the total number of noncapital state-prisoner habeas corpus decisions ("Total Decisions"); (2) the number of decisions on the merits of the petitioners' claims and/or the respondents' defenses ("Merits Decisions");[2] (3) the number of decisions in which relief was granted on some claim ("Total Grants"); (4) the number of decisions in which the relief granted was premised on either law or facts that were not before the state courts at the time they reviewed the same criminal judgment ("Grants New Law or Fact");[3] and (5) the number of decisions granting relief to prisoners convicted in each State per 1000

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[2] Most nonmerits decisions involved "exhaustion of remedies" questions. Decisions that turned on such defenses as procedural default, nonretroactivity, and abuse of the writ were classified as merits decisions.

[3] At this stage, a search was made for references to bad faith or unreasonable conduct by the reviewing state judges. No such references were found.

petitions filed by prisoners incarcerated in the that State for the corresponding years ("Total Grants/1000 Petitions Filed").[4] To account for varying circuit policies in regard to publishing habeas decisions, Table II presents intra-circuit comparisons, by State, of (1) the proportion of merits decisions in which habeas relief was granted and (2) the number of decisions in which habeas relief was granted per 1000 habeas petitions filed.

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[4] Data on numbers of petitions filed were taken from the Annual Reports of the Administrative Office of the United States Courts. To account for the fact that circuit decisions are rendered after the filing date, filing data from a period commencing and ending earlier than the circuit decisions commenced and ended were used. (Table I reports filing data from fiscal years 1988-89 and decisions from calendar years 1988-89; Table II reports filing data from fiscal years 1986-89 and decisions from calendar years 1987-90).